

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
SHRI SOUNDARARAJAN K., JUDICIAL MEMBER**

ITA No. 1637/Bang/2024
Assessment Year : 2017-18

M/s. SPL Realtors Pvt. Ltd., No. 31, 2 nd Main Road, T. Chowdaiah Road, Sadashivanagar, Bangalore – 560 080. PAN: AAKCS3575M	Vs.	The Deputy Commissioner of Income Tax, Circle – 6(1)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ananthan, CA
Revenue by	:	Shri Subramanian, JCIT-DR

Date of Hearing	:	25-11-2024
Date of Pronouncement	:	28-01-2025

ORDER

PER SOUNDARARAJAN K., JUDICIAL MEMBER

This is an appeal filed by the assessee challenging the order of the NFAC, Delhi dated 23/03/2024 in respect of the A.Y. 2017-18 and raised the following grounds:

“1. The order of the learned Assessing Officer is bad in law and against the facts of the case.

1.1 The learned Assessing Officer failed to appreciate that order passed u/s 154 is not tenable in law.

2. The learned Assessing Officer erred in rectifying the assessment order u/s 154 by disallowing Rs. 54.69.967/- (30% of Rs.1,82,33.223/-) u/s 40(a)(ia) of the Act.

2.1 *The learned Assessing Officer failed to appreciate that disallowance u/s 40(a)(ia) is outside the purview of Section 154.*

2.2 *The learned Assessing Officer failed to appreciate that an issue for adjudication of which investigation of further facts is necessary, but which is not on record is not covered under the scope of Section 154.*

2.3 *The learned Assessing Officer failed to appreciate that what can be rectified u/s 154 is the error which is apparent on the face of the record and mistake apparent from the record.*

2.4 *The learned Assessing Officer failed to appreciate the fact that the rectification carried out is not a mistake apparent from record.*

2.5 *The learned Assessing Officer failed to appreciate that mistake apparent from the record cannot be something which would have to be established by long drawn process of reasoning on points and verification of facts.*

2.6 *Without prejudice to the above. the learned Assessing Officer, without verifying the facts, erred in disallowing Rs. 54,69.967/- (30% of Rs.1.82.33,223/-) u/s 40(a)(ia) of the Act based on the amounts reported in the tax audit report.*

3. *Without prejudice to the above, the learned Assessing Officer failed to appreciate no disallowance can be made under Section 40(a)(ia) in view of the Second Proviso to Section 40(a)(ia) of the Act.*

3.1 *The learned Assessing Officer erred in disallowing Rs. 54,69,967/- (30% of Rs.1.82.33.223/-) u/s 40(a)(ia) even after complying with the conditions prescribed in Second Proviso to Section 40(a)(ia) of the Act.*

3.2 *The learned Assessing Officer erred in making the disallowance u/s 40(a)(ia) of the Act ignoring the evidence filed by the appellant i.e. Form 26A to substantiate the fact that the recipient had filed their return of income by including the amount paid by the appellant in their return of income and the recipient had*

paid tax due on the income declared in their return of income.

For all these and other grounds, which may be urged at the time of hearing. the appellant prays that its appeal be allowed.”

2. The brief facts of the case are that the assessee is a private limited company and filed their return of income on 30/10/2017 and declared a loss of Rs. 3,10,95,721/-. The case was selected for scrutiny and the assessment was completed on 15/06/2019. Subsequently, the AO issued notice u/s. 154 of the Act to rectify some mistakes. The mistakes pointed out by the AO is that, “on verification of the form 3CD, it is proposed to disallow 30% of Rs. 1,82,33,223/- since the TDS was not deducted”. The assessee filed their objections and contended that the disallowance of 30% u/s. 40(a)(ia) of the Act is unwarranted since they had complied with the conditions specified in the second proviso to section 40(a)(ia) of the Act. The assessee also furnished the copy of form 26A and the challans for the payment of interest along with the objections. The assessing officer without considering the objections raised by the assessee, had confirmed the disallowance made u/s. 40(a)(ia) of the Act. As against the said order passed u/s. 154 of the Act, the assessee filed an appeal before the Ld.CIT(A) and also contended that the disallowance u/s. 40(a)(ia) of the Act could not be made by way of rectification u/s. 154 of the Act and further contended that the AO had erred in invoking sec.40(a)(ia) of the Act when the second proviso to section 40(a)(ia) was complied with by the assessee. The assessee also filed the Form 26A, the certificate issued by the accountant as per the Proviso to Section 201 of the Act. The Ld.CIT(A) had also not considered the disputes raised by the assessee and also not discussed about the documents filed by the assessee, had confirmed the disallowance made by the AO. The assessee also filed a rectification petition before the Ld.CIT(A) to rectify the said mistake of not considering the documents furnished before him but the Ld.CIT(A) had rejected the same. Therefore the assessee is approaching this Tribunal by filing this appeal.

3. At the time of hearing, the Ld.AR submitted that both the authorities had failed to look into the provisions of the Act before making the disallowance. The Ld.AR further submitted that in spite of the fact that the assessee had submitted form 26A, and the annexures, the AO as well as the Ld.CIT(A) had failed to give a finding about the same. The Ld.AR prayed that the assessment order as well as the appellate order is bad in law and liable to be set aside.

4. The Ld.DR relied on the orders of the lower authorities and prayed to dismiss the appeal.

5. We have heard the arguments of both sides and perused the materials available on record.

6. We have gone through the assessment order as well as the rectification order passed by the AO in which the AO had disallowed 30% of the interest payments u/s. 40(a)(ia) of the Act for the reason that TDS was not deducted. We have also gone through the objection filed by the assessee and also the annexure – A and the tax paid counterfoils. The assessee had properly explained the facts that the payee i.e. Shriram Properties Ltd. had received the interest and the development management fees from the assessee without deduction of tax since the payee had furnished the certificate issued by the accountant under the first proviso to sub-section (1) of section 201 from which we came to know that the payee had included the said incomes in their return and paid the tax dues. Before proceeding further, we will look into the provisions which deals with this issue.

“Amounts not deductible.

Section 40. *Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—*

(a) in the case of any assessee—

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid:

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purposes of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso.

Explanation.—For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139 :

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid :

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso.

7. Similarly, section 201(1) of the Act reads as follows:

“Consequences of failure to deduct or pay.

201. (1) *Where any person, including the principal officer of a company,—*

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a payee or on the sum credited to the account of a payee shall not be deemed to be an assessee in default in respect of such tax if such payee—

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:

Provided further that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

8. As seen from the second proviso to section 40(a)(ia) if the assessee is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then as per the said provision, it is deemed that the assessee has deducted the TDS and paid the same. Therefore no deduction of 30% would be made as per Section 40(a)(ia) of the Act.

9. The assessee shall be deemed that they had deducted and paid the tax on such sum on the date of furnishing of return of income by the payee. Similarly, section 201(1) first proviso also granted immunity from treating the assessee in default when the payee had furnished his return of income u/s. 139 and had taken into account the said sum for computing the income and paid the tax due on the income received by him from the assessee.

10. Admittedly, in the present case, the assessee had filed form 26A as per Rule 31ACB of the Rules which is the certificate to be issued by the accountant under the first proviso to sub-section (1) of section 201 of the Act. As seen from the Annexure – A of Form 26A, the complete details of the amounts paid by the assessee were mentioned on which the assessee had not deducted the TDS and also the details of the payee and details of the returns filed by the payee in which the payee had included the said receipts in their return of income filed on 31/10/2017 vide acknowledgment no. 279882901311017 has been mentioned. Therefore the assessee had complied with the procedures contemplated under the provisions of 40(a)(ia) and section 201(1) first proviso and therefore the deduction of 30% is not required.

11. Even though the said facts were placed before the AO as well as before the Ld.CIT(A), no findings has been given by both the authorities and therefore the orders passed by the authorities are not a well considered one and they are liable to be set aside.

12. The Ld.CIT(A) had observed that the payment of interest u/s. 201(1A) of the Act and section 40(a)(ia) are different and on that basis confirmed the disallowance made by the AO. The said finding of the Ld.CIT(A) is not correct and also against the above said provisions of the Act. When the Statue had permitted the assessee not to deduct the TDS, the order passed by the authorities without granting the said benefit is also not correct. From the above said facts, we understand that the assessee had not deducted the TDS based on the provisions contained in section 40(a)(ia) and section 201(1) of the Act. Pursuant to the above said provisions, the assessee had also filed form 26A and produced the same before the authorities but unfortunately both the authorities had failed to look into the same and gave a finding on it.

13. In these circumstances, we have no hesitation to set aside both the orders of the authorities below and remit the issue back to the AO to consider the provisions and the Form 26A filed before the authorities and if they are in order grant the benefit in accordance with law after granting a reasonable opportunity of being heard to the assessee.

14. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 28th January, 2025.

Sd/-
(LAXMI PRASAD SAHU)
Accountant Member

Sd/-
(SOUNDARARAJAN K.)
Judicial Member

Bangalore,
Dated, the 28th January, 2025.
/MS /

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| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | 6. CIT(A) |

By order

Assistant Registrar,
ITAT, Bangalore